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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13) CR No. 07-678 JSW
14)
15) UNITED STATES OF AMERICA,) MEMORANDUM IN OPPOSITION TO
16) Plaintiff,) DEFENDANT SILVA'S MOTION FOR A
17) v.) BILL OF PARTICULARS
18) GLENIO JESUA FERREIRA SILVA,)
19) Defendant.) Hearing Date: May 15, 2008, 2:30 pm
20)) Courtroom: Floor 17, Ctrm 2
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MEMORANDUM IN OPPOSITION TO DEFENDANT SILVA'S MOTION FOR A BILL OF PARTICULARS -
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1 **I. INTRODUCTION¹**

2 The defendant's Motion For a Bill of Particulars should be denied. The indictment, along
3 with the extensive discovery produced by the United States, provides the defendant with
4 adequate notice of the charge against him; permits him to prepare his defense for trial; negates
5 any threat of surprise at trial; and sufficiently protects the defendant's Double Jeopardy interests.
6 Accordingly, there is no basis for this Court to require the United States to provide a bill of
7 particulars.

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9 **II. BACKGROUND**

10 On June 15, 2007, the Honorable Bernard Zimmerman issued a complaint and arrest
11 warrant² charging the defendant with one count of Alien Harboring, in violation of Title 8 of the
12 United States Code, section 1324(a)(1)(A)(iii) and on October 7, 2007, Silva was indicted in a
13 one-count indictment charging the same. (*ECF Document Nos. 1, 21*). The Indictment alleges
14 that:

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19 ¹ In his *Motion*, the defendant appears to allege that the Indictment by which he was
20 charged is not legally sufficient. *Motion*, pp. 7-8. By this Memorandum, the United States
21 responds solely to the defendant's *Motion for a Bill of Particulars*, not any other issues raised by
22 the defendant. On April 4, 2008 and in a subsequent Stipulation, defense counsel represented to
23 this Court that his first series of motions would be discovery motions. (*See ECF Nos. 41, 51*).
24 This *Motion* was filed in accordance with a schedule set for those discovery motions. (*See ECF*
25 *No. 52*.) In light of these representations and the fact that the instant motion is neither captioned
26 as a motion to dismiss the indictment nor does it seek relief that would be available if an
27 indictment was found to be insufficient, the United States has not responded to the defendant's
28 argument concerning the sufficiency of the indictment. However, the United States reserves the
right to respond to the non-discovery arguments raised in the defendant's Motion if and when he
files dispositive motions in his next series of motions.

2 ² The 15-page affidavit submitted in support of the Complaint and associated search
warrant presents detailed factual information concerning the crime with which the defendant has
been charged.

1 Beginning on a date unknown to the Grand Jury but not later than April 30, 2000,
2 and continuing until on or about June 15, 2007, in the Northern District of
California, the defendant,

3 GLENIO JESUA FERREIRA SILVA,

4 did knowingly and intentionally conceal, harbor, and shield from detection aliens,
5 including John Doe #1; John Doe #2; John Doe #3; John Doe #4; John Doe #5;
6 and John Doe #6 at 954 B Street, Hayward, California and 599 Monterey Street,
San Francisco, California, in knowing or reckless disregard of the fact that the
aliens had remained in the United States in violation of law, in violation of Title
8, United States Code, Section 1324(a)(1)(A)(iii).

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8 (*Indictment, ECF No. 21*).

9 Since the defendant was charged, the United States has produced copious amounts of
10 discovery that has provided the defendant with, in effect, a roadmap of the government's case.
11 The production has included witness statements; subpoenaed records from labor authorities;
12 reports of and photographs and videos from surveillance; A-files of the allegedly harbored aliens;
13 and copies of and access to all materials seized in the course of search warrants executed at the
14 locations identified in the Indictment - - defendant's businesses. Specifically, prior to
15 indictment, the United States produced 2691 pages of discovery. Following indictment, the
16 United States produced an additional 340 pages and CD-ROMs. Although much of this
17 production fell outside of the parameters of Rule 16(a)(1), the United States nonetheless provided
18 the material. In addition, the defendant has made numerous requests for additional material,
19 again, much of which fell outside of Rule 16(a)(1) discovery. Nevertheless, in a good-faith effort
20 to provide virtually open-file discovery, the United States has procured and produced material in
21 response to these requests. Finally, in addition to "paper" discovery, the defendant has been
22 present and participated in three material witness depositions of certain aliens alleged to have
23 been harbored. (*See ECF No. 38; United States v. Gilson Araujo and Wander Carlos De Araujo,*
24 *Material Witnesses, No. 07-90419 MISC EDL (non-e-filing)*).

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1 **III. ARGUMENT**

2 The Indictment and the ample discovery provided to date negates the need for a bill of
 3 particulars in this case. Rule 7(f) of the Federal Rules of Criminal Procedure provides:

4 The court may direct the filing of a bill of particulars. A motion for a bill of
 5 particulars may be made before arraignment or within ten days after arraignment
 6 or at such later time as the court may permit. A bill of particulars may be
 7 amended at any time subject to such conditions as justice requires.

8 A bill of particulars serves three functions: (1) to inform the defendant of the nature of the
 9 charges against him with sufficient precision to enable defendant to prepare for trial; (2) to avoid
 10 or minimize the danger of surprise at trial; and (3) to protect the defendant's Double Jeopardy
 11 interests. *United States v. Giese*, 597 F.2d 1170, 1180–81 (9th Cir. 1979).

12 The appropriate judicial inquiry here is whether the indictment and government
 13 disclosures sufficiently accomplish these three purposes absent a bill of particulars. *United*
 14 *States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983); *see also* Wright, *Federal Practice and*
 15 *Procedure*, Criminal Section 129, p. 289 (West 1969). Where, as here, the indictment and
 16 discovery give the necessary details of the offenses charged, the defendant is not entitled to a bill
 17 of particulars. *United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984); *Giese*, 597 F.2d at
 18 1181.

19 An indictment sufficiently apprises the defendant of the charges against him if “those
 20 words [of the indictment] fully, directly, and expressly, without any uncertainty or ambiguity, set
 21 forth all of the elements necessary to constitute the offense intended to be punished.” *United*
 22 *States v. Chenaur*, 552 F.2d 294, 301 (9th Cir. 1977) (quoting *Harling v. United States*, 418 U.S.
 23 87, 117–18 (1973)). Here, the indictment tracks that language of the charged statute. *Compare*
 24 *Indictment* (ECF No. 21) with 8 U.S.C. § 1324(a)(1)(A)(iii) (“Any person who knowing or in
 25 reckless disregard of the fact that an alien has come to, entered, or remains in the United States in
 26 violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or
 27 shield from detection, such alien in any place, including any building or any means of
 28 transportation ... shall be punished”).

1 Indictment (ECF No. 21):

8 U.S.C. § 1324(a)(1)(A)(iii):

2
3 Beginning on a date unknown to the Grand
4 Jury but not later than April 30, 2000, and
5 continuing until on or about June 15, 2007,
6 in the Northern District of California, the
7 defendant the defendant,

8
9 GLENIO JESUA FERREIRA SILVA,

10
11 did knowingly and intentionally conceal,
12 harbor, and shield from detection aliens,
13 including John Doe #1; John Doe #2; John
14 Doe #3; John Doe #4; John Doe #5; and
15 John Doe #6 at 954 B Street, Hayward,
16 California and 599 Monterey Street, San
17 Francisco, California, in knowing or reckless
18 disregard of the fact that the aliens had
19 remained in the United States in violation of
20 law, in violation of Title 8, United States
21 Code, Section 1324(a)(1)(A)(iii).

22
23 “Any person who knowing or in reckless
24 disregard of the fact that an alien has come
25 to, entered, or remains in the United States
in violation of law, conceals, harbors, or
shields from detection, or attempts to
conceal, harbor, or shield from detection,
such alien in any place, including any
building or any means of transportation ...
shall be punished”

26
27 Further, it is well established that “[f]ull discovery will obviate the need for a bill of
28 particulars.” *United States v. Clay*, 476 F.2d 1211, 1215 (9th Cir. 1973) (denial of the motion
for a bill of particulars was appropriate where the defendant was granted full discovery) In
United States v. Giese, the court in denying a motion for a bill of particulars, held that “[f]rom
the indictment and the government evidence that he did receive, [defendant] learned enough of

1 the charges against him to prepare for trial, to avoid surprise at trial, and to plead double jeopardy
 2 in the event of a new prosecution.” 597 F.2d at 1180-81. *See also Long*, 706 F.2d at 1054
 3 (holding that having received full discovery, the defendant was not entitled to a bill of
 4 particulars). In this case, as set forth above, the United States has provided ample discovery that
 5 more than sufficiently apprises the defendant of the nature of the case.

6 The defendant contends a Bill of Particulars is necessary because

- 7 -- he is unable to identify the aliens allegedly harbored by the defendant;
- 8 -- he cannot ascertain the date of the criminal conduct;
- 9 -- he cannot determine the criminal conduct that constituted the “concealing,
 harboring, or shielding from detection,”
- 10 -- the Indictment lacks allegations of the defendant’s specific intent.

12 *Motion*, p. 3. He further claims that he needs this particularized information, in part, “to review
 13 and organize the discovery received from the government” and to “file pre-trial motions.”

14 *Motion*, pp. 3, 7.

15 The defendant’s general desire to organize discovery and obtain further information for
 16 pretrial motions does not entitle him to a bill of particulars. It has been established that
 17 “generalized discovery is not a permissible goal of a bill of particulars,” *United States v. Davis*,
 18 582 F.2d 947, 951 (5th Cir. 1978). A bill of particulars is neither a substitution for nor an
 19 expansion of discovery proceedings. It “is designed to apprise the defendant of specific charges
 20 being presented to minimize danger of surprise at trial, to aid in preparation and to protect against
 21 double jeopardy.” *Long*, 706 F.2d at 1054. A bill of particulars “is not designed to compel the
 22 government to detailed exposition of its evidence or to explain the legal theories upon which it
 23 intends to rely at trial.” *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980) (quoting
 24 *United States v. Sherriff*, 546 F.2d 604, 606 (5th Cir. 1977)).

25 Taking each of the areas identified by the defendant, only one falls within the scope of
 26 information that would be permissible under a bill of particulars. However, the United States as
 27 already provided that information and, as such, that portion of the motion is moot.

1 Defense Request for Identification of Harbored Aliens

2 The United States has previously identified the aliens allegedly harbored by the
 3 defendant. Counsel have engaged in correspondence this effect. In fact, in response to a request
 4 by defense counsel, the United States provided A-Files for all of the allegedly harbored aliens.
 5 However, to the extent that the defendant is still uncertain as to the identity of these individuals,
 6 the United States will provide additional notice by letter of the identities of the aliens.

7 Defense Uncertainty As To The Date of Criminal Conduct

8 The Indictment plainly sets forth that the charged criminal conduct occurred over a period
 9 of years. "Beginning on a date unknown to the Grand Jury but not later than April 30, 2000, and
 10 continuing until on or about June 15, 2007 ..." *Indictment, (ECF No. 21)*. The defendant's claim
 11 that the charged dates are not sufficient disregard the well-established concept that a offense can
 12 occur over a period of years and that if any of the conduct falls with the statute of limitations, the
 13 indictment stands. A continuing offense will be found to be within a statute of limitations if
 14 some of the criminal activity occurred in the five years preceding the indictment. *Flinkote v.*
 15 *United States*, 7 F.3d 870, 873 (9th Cir. 1993) ("[a]s long as some part of the [criminal action]
 16 continued into the five- year period preceding the indictment, the statute of limitations did not
 17 insulate [the defendant] from criminal liability for actions taken more than 5 years prior to the
 18 time of the indictment"). As alleged in the Indictment, the offense was a continuing offense that
 19 occurred from a date beginning not later than April 30, 2000 through June 15, 2007.

20 Request for Specific Conduct That Constituted the "Concealing, Harboring, or Shielding
 21 from Detection"

22 The United States is not required to identify the means by which it intends to prove its
 23 case. In *Giese*, the Court upheld the denial of the defendant's motion for a bill of particulars,
 24 stating that "[a]ppellant's request for the 'when where and how' of every act in furtherance of the
 25 conspiracy was equivalent to a request for complete discovery of the government's evidence,
 26 which is not a purpose of the bill of particulars" 597 F.2d at 1180-81. The indictment in this
 27 case has set forth the date and location of the alleged crime. In discovery and correspondence,

1 the United States has provided notice of the allegedly harbored aliens, who were identified as
2 John Does in the Indictment. Between the indictment and the ample discovery produced, the
3 defendant has access to all information related to the means by which the crime was perpetrated.
4 The United States has no obligation to lay out its trial strategy or the “when, where, and how” it
5 will prove its case.

6 Request For Allegation of Specific Intent

7 To the extent that the defendant’s contention on this issue is a statement as to the
8 sufficiency of the indictment, the United States will respond to that argument if and when the
9 defendant files a motion to dismiss based on the sufficiency of the indictment. *See supra*, fn. 1.
10 If the defendant is claiming that he is entitled to notice of evidence of the defendant’s specific
11 intent, the United States believes that this argument lacks merit. Tellingly, the defendant’s
12 motion is devoid of any case law to support his claim that such information is required in a bill of
13 particulars. As set forth above, the United States is not obligated to identify which evidence will
14 be used to prove which aspects of its case.

15

16 **IV. CONCLUSION**

17 The Indictment and full discovery provides the defendant with adequate notice of the
18 charge against him; permits him to prepare his defense for trial; negates any threat of surprise at
19 trial; and sufficiently protects the defendant’s Double Jeopardy interests. There is no surprise
20 here. Defendant is simply attempting to use this Motion as a tool to gain information to which he
21 is not entitled. For all these reasons, this Court should deny the defendant’s Motion.

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23 JOSEPH P. RUSSONIELLO
United States Attorney

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25 DATED: April 25, 2008

/s/
DENISE MARIE BARTON
Assistant United States Attorney

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